

Thank you chairman Bishop and Representative Connolly for the opportunity to testify for House Bill 534, with qualifications.

My name is John Kincaid. I am the Robert B. and Helen S. Meyner Professor of Government and Public Service at Lafayette College. I was Executive Director of the old ACIR from 1988 to mid-1994.

Enacting the Restore the Partnership Act would be an important acknowledgment by Congress of the need to repair our dysfunctional federal system. However, except for the bill's addition of two tribal members, which I support, and one more state legislator and county officer compared to the old ACIR, the bill virtually duplicates the old ACIR.

This is a problem because the old ACIR was born in 1959 in an era of bipartisanship. It operated most smoothly during that era. Rising political polarization, however, rocked the old ACIR, finally scuttling it in 1996. Polarization is now at an all-time high. Because virtually all public policy is intergovernmental, re-birthing the ACIR with the same mandate will revive polarization. This would miss a great opportunity to think innovatively about a new ACIR.

Polarization might be mitigated by (1) structuring the membership and/or (2) defining a clearer mission.

H.R. 354's appointment process ensures that under unified government, at least 18, possibly 20, of the 30 members will belong to the president's party. If Congress is controlled by the opposite party, at least 16 members will still be of the president's party on a commission for which the bill requires only 13 of 30 members for a quorum. This structure will bypass polarization by allowing party-line votes with as few as 13 members. However, the legitimacy of the products of such votes will be suspect.

A better way to mitigate polarization would be to define a more focused ACIR mission modeled perhaps after the bipartisan CBO. Such a mission could have five key components. A new ACIR could (1) advise the executive and legislative branches on improving the intergovernmental operations and waiver processes of the White House and federal agencies, especially their IGR offices, as well as (2) advise those branches and state, tribal, and local governments of the intergovernmental consequences of U.S. Supreme Court rulings. It also could identify, study, and make recommendations on (3) extant regulations found to be intergovernmentally problematic, (4) the federal government's 1,216 grants-in-aid, and (5) House and/or Senate bills having intergovernmental impacts. The latter is already implied in Section 6 (3) of H.R. 354. A new ACIR could highlight preemptions, waiver potentials, and intergovernmental administrative issues in pending bills.

To give the new ACIR more clout, mechanisms should be created to ensure that ACIR recommendations are officially incorporated into the legislative process, reviewed by relevant White House staff and agency heads, and even published in the *Federal Register*.

The size of an ACIR staff and its appropriations will depend on the new ACIR's duties. When I left in 1994, ACIR had about 18 full-time employees. I believe the old ACIR's highest appropriation ever was \$2.1 million in FY 1985, which would be about \$4.9 million today. In FY 1994, the old ACIR had one of the biggest budgets in its history, but that was because, in addition to the appropriation, it had revenues from state contributions and publication sales. I assume a new ACIR would function only on congressional appropriations.

My written testimony contains more discrete suggestions. Missing from the bill, for instance, is at least one township representative, who could be nominated by the National Association of Towns and Townships. For mayoral appointments, I would suggest dropping the population threshold to at least 100,000, if not 50,000, because only 13 percent of Americans live in municipalities having 500,000 or more people. H. R. 354 is over-weighted in favor of the minority of Americans living in big cities. I also would suggest dropping to one the number of county representatives from counties having less than 50,000 residents. Appointing two from such counties will overrepresent rural counties. Although most Americans live in small and medium-size communities, they are largely clustered in metropolitan counties.

Again, I support a new ACIR, but more thought could be given to how best to make it truly successful. I thank you for listening.

#### Further Comments on H.R. 354

The new ACIR's Declaration of Purpose is virtually the same as that of the old ACIR. Purposes (1), (2), and (3) have nearly the same wording as Purposes (1), (2), and (3) in P.L. 86-380. Purpose (4) of the new ACIR was purpose (5) of the old ACIR. Purpose (4) of the old ACIR has become Duty (3) of the new ACIR, and purposes (6) and (7) of the old ACIR have become duties (4) and (5) of the new ACIR.

The purposes and duties are laudable, but in today's politically polarized environment, there is ample reason to worry that polarization will hobble a new ACIR consisting of members of both political parties. The old ACIR functioned rather smoothly during the era of bipartisanship but was increasingly buffeted and weakened by rising party polarization after 1980.

Let me offer potential examples. Duty (5) of the new ACIR, which was purpose (7) of the old ACIR, is to "recommend methods of coordinating and simplifying tax laws..." Although the old ACIR produced many tax reports and recommendations, it had very little impact on the intergovernmental dimensions of taxation and no impact on the 1986 Tax Reform Act. Big federal tax laws, such as the 2017 Tax Cuts and Jobs Act, are driven by political forces much stronger than any influence mustered by an ACIR. Consider, too, how an ACIR in 2017 would have split internally over such issues as the deductibility of state and local taxes.

Purpose (4) of the new ACIR, which was purpose (5) of the old ACIR, would require the new ACIR to encourage discussion and study of emerging intergovernmental issues. One such major issue now is state and local taxation of remote mail-order sales. No matter how the U.S.

Supreme Court rules in *South Dakota v. Wayfair*, there will be a need for congressional action. But how would a new ACIR handle this issue when some members of Congress and some powerful interest groups oppose such taxation altogether? Even if a new ACIR addressed this issue, there would be conflict over whether local governments that levy sales taxes should get what they regard as their fair share of remote sales-tax revenues. There might also be conflict over whether the sales-tax situs should be the customer's location or the retailer's location.

How would a new ACIR handle environmental protection in an era when Democratic state AGs sue the U.S. EPA when Republicans are in control and Republican state AGs sue the U.S. EPA when Democrats are in control?

These examples illustrate why polarization would disable a new ACIR. In order to function at all, a new ACIR might have to steer clear of the really important intergovernmental issues facing the country.

Perhaps using CBO as a model, the new ACIR could be given a more focused mandate. Although CBO is structured quite differently than the proposed new ACIR, and it has a more technical mandate, giving the new ACIR a more pragmatic and focused mandate could elicit what the federal, state, tribal, and local representatives on the new ACIR would have in common.

Along CBO lines, it would be useful for a new ACIR to advise the executive and legislative branches on the intergovernmental responsiveness of the White House and federal agencies and viability of their IGR offices. This might be workable because, presumably, state, tribal, and local officials from both parties have a common interest in well-functioning federal agencies. Even so, there would likely be some sniping and grandstanding from ACIR commissioners who belong to the party that does not control the White House.

Because the U.S. Supreme Court has become a major player in the federal system, a new ACIR could study Supreme Court rulings affecting the federal system and make recommendations when necessary on how the federal legislative and executive branches, as well as state, tribal, and local governments, might best address the intergovernmental consequences of such rulings.

Given that both parties claim concern about excess regulation, a new ACIR also could identify, study, and make recommendations to improve extant regulations that are intergovernmentally problematic.

The new ACIR also could study and recommend improvements in the grants-in-aid system. It should be recognized, though, that the old ACIR repeatedly recommended that federal grants be reduced in number through consolidations and block grants; however, the number of grants continued to proliferate from 132 when ACIR began operations to 633 when ACIR ceased operation. As of 2016, there were 1,196 funded categorical grants and 20 funded block grants. The old ACIR also made recommendations to give state and local governments more flexibility to coordinate different grants to meet state and local needs.

A further complication is that Medicaid alone now accounts for more than two-thirds of all federal aid to state and local governments. Hence, the remaining 1,215 grants account for only one-third of federal aid.

Fifth, a new ACIR could identify, study, and make recommendations on House and/or Senate bills that have, or should have, intergovernmental implications. This is already implied in Section 6 (3) of H.R. 354. CBO only examines intergovernmental fiscal impacts and mandates. It only occasionally examines preemptions. A new ACIR could highlight preemptions, waiver potentials, and intergovernmental administrative issues in pending bills.

A more focused mission along these lines might mitigate polarization. Further, these four missions lend themselves to staff analyses. Like CBO, it should be possible to recruit and retain a non-partisan ACIR staff that could frame recommendations for commission approval.

Purposes (2) and (4) envision the new ACIR as a forum for discussion. How will this work? The new ACIR is authorized to hold public hearings and the like. Will it also be expected to publish hearing transcripts, reports, and recommendations? If so, in what forms? The old ACIR issued many reports, all of which were distributed free to libraries and individuals until about 1987, when Congress required the ACIR to charge prices for its reports. If the new ACIR were to issue reports only electronically, it would avoid paper-report costs.

Would the new ACIR be authorized and even expected to conduct some or all of its research through contracts with external researchers? During my years at ACIR, ACIR increasingly contracted out research for two reasons: (1) it was less expensive than full-time employees, and (2) full-time research staff do not have all the expertise needed to cover changing topics of commission inquiry over the years. A full-time ACIR researcher who is an expert on Medicaid, let's say, will not be of much help when the ACIR turns its attention to highways or environmental protection. Using external researchers under contract seems to be implied in Section 7 (d) (2).

Would the new ACIR be authorized or expected to issue informational reports along the lines, for example, of the old ACIR's annual *Significant Features of Fiscal Federalism*? Many of the old ACIR's reports were solely staff-produced information reports.

During staff preparation of reports and recommendations, the old ACIR hosted small-group "critics' sessions" to which relevant experts and interest-group representatives were invited to critique the drafts and offer revision suggestions. I found most of these sessions to be very informative and productive.

Regarding ACIR membership, one recurring problem encountered by the old ACIR was slow presidential appointments. After the 1992 election when I was executive director, ACIR had ten commissioner vacancies, including the chair. President Clinton did not fill the vacancies until October 1993—although he did meet with the Commission in December 1993 to help reboot it.

As a practical matter in today's polarized environment, NGA will likely recommend governors vetted by the DGA and RGA; hence, the gubernatorial commissioners could be quite partisan.

Having tribal members is a good idea, but why are they appointed directly by the Secretary of the Interior rather than by the President? Would it not be more prestigious for the commissioners from Indian Country to be appointed by the President?

Under Section 4 (b) (5), I would recommend dropping the population threshold to at least 100,000, if not 50,000, because only about 13 percent of Americans live in municipalities having 500,000 or more people. Also, the 2012 Census of Governments reported 19,619 municipalities. Only 33 municipalities have populations of 500,000 or more, and only 307 municipalities have populations of 100,000 or more. The majority of Americans have always lived in cities having 50,000 or fewer residents. So, the proposal for the new ACIR is over-weighted in favor of the minority of Americans living in big cities.

Under Section 4 (b) (6), I would suggest dropping from two to one the number of county representatives from counties having less than 50,000 residents. Appointing two from such counties will overrepresent rural counties. Although most Americans live in small and medium-sized cities and townships, these jurisdictions are largely clustered in metropolitan counties.

It should be noted that the National Association of Towns and Townships, founded in 1976, agitated for seats on the old ACIR. Census reported 16,360 townships in 2012 (compared to 19,519 municipalities). Only about 20 states have townships, but in many of those states such as New Jersey, New York, and Pennsylvania, townships are full-fledged general-purpose municipal governments. I believe they are also treated as such for federal grant purposes.

Under Section 5 (b), will a commission consisting of new appointees be able to choose a chair and vice chair effectively?

Under Section 5 (c), a quorum of 13, which is the same as the old ACIR, will mean that, because the new ACIR will have 30 members, state legislators and local and tribal members only could constitute a quorum. If the new ACIR functions similarly to the old ACIR, the most sporadic attendees will be members of Congress, members of the executive branch, and governors.

The quorum rule should be at least 15, if not 16, members present for a 30-member commission, or 17 for a 31-member commission.

Does the proposed bill need a section on compensation similar to Section 7 of the old ACIR statute?

A new ACIR is much needed, but more innovative thought should be given to making a new ACIR more effective and durable than the old ACIR.

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